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Making Sense Of The Prejudgment Seizure Cases

BY RICHARD S. KAY* & HAROLD M. LUBIN**

The purpose of this article is to examine critically four recent Supreme Court cases on prejudgment seizure, *Sniadach v. Family Finance Corp.*,¹ *Fuentes v. Shevin*,² *Mitchell v. W.T. Grant Co.*,³ and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*⁴ These cases have been cited as an arch-example of inconsistency, even irrationality, in constitutional doctrine. Members of the Supreme Court and numerous scholars have expressed chagrin at the apparent irresponsible obscurity at this difficult intersection of creditors' remedies and constitutional rights.⁵ We believe, however, that the search for reasonable and rational constitutional standards is not a hopeless task. We hope to show that there are emerging recognizable, if still indistinct, tests, against which state schemes for balancing the prejudgment rights of creditors and debtors may be measured. In short, we will assert that the recent prejudgment seizure cases, read together sympathetically, make sense.

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¹ 395 U.S. 337 (1969).

² 407 U.S. 67 (1972).

³ 416 U.S. 600 (1974).

⁴ 419 U.S. 601 (1975).

⁵ Justice Blackmun, dissenting in *North Georgia Finishing, Inc.*, declared that the justices were "immersed in confusion, with *Fuentes* one way, *Mitchell* another, and now this case decided in a manner that leaves counsel and the commercial communities in other states uncertain as to whether their own established and long-accepted statutes pass constitutional muster with a wavering tribunal off in Washington, D.C." 419 U.S. at 619. See, e.g., Hansford, *Procedural Due Process in the Debtor-Creditor Relationship: The Impact of Di-Chem*, 9 GA. L. REV. 589, 606-09 (1975); Katz & Robinson, *Due Process and Creditors' Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond*, 28 RUTG. L. REV. 541, 562 (1975); Scott, *Constitutional Regulation of Provisional Creditors' Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807, 809 (1975); Comment, *Constitutional Law*, 1975 U. ILL. L.F. 263; Comment, *Due Process and the Creditors Right to Prejudgment Seizure*, 10 GONZAGA L. REV. 757, 770-775 (1975).

I. BACKGROUND

The facts and reasoning of the Supreme Court in this area have been canvassed in voluminous commentary.⁶ Therefore, a brief summary of the pattern of constitutional law the recent cases have created should be sufficient before applying a closer analysis. The modern Court's first venture into the area occurred in 1969 in *Sniadach v. Family Finance Corp.*⁷ in which a Wisconsin statute authorizing creditors to garnish the wages of an allegedly defaulting debtor was struck down. In a brief opinion Justice Douglas emphasized the hardship wage garnishment may impose on an impoverished debtor and held that "[w]here the taking of one's property is so obvious" it was clear that notice and hearing were required by the fourteenth amendment prior to the seizure.⁸

The 1972 decision in *Fuentes v. Shevin*⁹ answered many of the questions on the scope and quality of due process protection to debtors left unanswered in *Sniadach*. In that case the Court invalidated Florida and Pennsylvania replevin procedures permitting seizure of goods on the *ex parte* application of any person claiming a right to them. Justice Stewart's opinion for the four member majority rejected the claim that only seizures of basic necessities were required to be preceded by notice and hearing, noting that the fourteenth amendment protects "'property' generally",¹⁰ and the Court would not evaluate the relative importance of different goods to litigants. The Court also carved out certain "extraordinary situations" in which the requirements of due process might be relaxed but found the challenged statutes to be outside these exceptions. Declaring

⁶ See, e.g., Clark and Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973); Countryman, *The Bill of Rights and the Bill Collector*, 14 ARIZ. L. REV. 521 (1973); Phillips, *Revolution and Counterrevolution: The Supreme Court on Creditors' Remedies*, 3 FORDHAM URBAN L.J. 1 (1974); Rendleman, *Analyzing the Debtor's Due Process Interest*, 17 WM. AND MARY L. REV. 35 (1975); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 85 (1972); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 71 (1974). See authorities cited note 5 *supra*.

⁷ 395 U.S. 337 (1969).

⁸ *Id.* at 342.

⁹ 407 U.S. 67 (1972).

¹⁰ *Id.* at 90. Justice Stewart emphasized this by noting that unless a property interest can be characterized as *de minimis* the deprivation must be preceded by notice and hearing. *Id.* at 90, n. 21.

that these situations must be "truly unusual," it implied that there is a presumption that prejudgment seizure procedures are invalid unless a strong showing is made that only "extraordinary situations" are covered.¹¹

In *Mitchell v. W.T. Grant Co.*,¹² decided in 1974, the Louisiana sequestration statute directing seizure of goods held by an allegedly defaulting debtor on the *ex parte* application of a creditor holding a vendor's lien on the goods was upheld. Significantly, the four justices of the *Fuentes* majority dissented, while Justice White, author of the *Fuentes* dissent, wrote the opinion for a majority created by the addition of Justices Powell and Rehnquist, who had not participated in *Fuentes*. The opinion stressed that the due process clause was flexible enough to accommodate schemes protecting the property interests of creditors as well as debtors¹³ and distinguished *Fuentes* on four grounds: (1) The *Mitchell* scheme required the creditor to allege specific facts supporting his claim rather than the bare assertion of a right sufficient in the statutes struck down in *Fuentes*. (2) In *Mitchell* the application for seizure was made to a judge not a "court functionary." (3) The grounds for seizure in *Fuentes* were merely that the goods were "wrongfully detained" whereas the *Mitchell* procedure was more narrowly confined. (4) In *Mitchell* and absent from *Fuentes* the debtor had a right to an immediate postseizure hearing at which the creditor had to prove his right to possession.¹⁴ Justice Powell concurred, but concluded that *Fuentes*, broadly construed, had been overruled.¹⁵

Finally, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,¹⁶ the Court again was faced with a garnishment statute. The Court's brief opinion was again authored by Justice White, joined by the four Justices of the *Fuentes* majority who had dissented in *Mitchell*. Finding that the distinguishing features of the Louisiana sequestration scheme in *Mitchell*¹⁷ were absent

¹¹ *Id.* at 90, 91, 93.

¹² 416 U.S. 600 (1974).

¹³ *Id.* at 604.

¹⁴ *Id.* at 615-618.

¹⁵ *Id.* at 623. In their dissent Justices Stewart, Douglas, and Marshall also abandoned hope for *Fuentes*. *Id.* at 635.

¹⁶ 419 U.S. 601 (1975).

¹⁷ *Supra* note 14.

from the Georgia garnishment law sub judice, the Court applied *Fuentes* and found the statute unconstitutional.¹⁸ Justice Powell concurred only in the judgment emphasizing what he saw as *Mitchell's* permanent departure from the apparently absolute requirement of prior notice and hearing in *Fuentes*.¹⁹

II. THE EXTRAORDINARY SITUATIONS

Although *Mitchell* cannot be reconciled with *Fuentes* sentence by sentence, *Fuentes*, read as a whole, does not stand for the inflexible requirement that every state-assisted taking be preceded by notice and hearing.²⁰ Indeed, Part VI of that opinion is concerned with situations in which deprivations of property may take place consistent with the due process clause without prior notice and hearing. These limited, truly unusual, "extraordinary situations" contain, we submit, the key to understanding the rule which emerges from these cases. It will be useful, therefore, to examine the Court's statement of these situations in *Fuentes*:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.²¹

¹⁸ *Id.* at 606-07.

¹⁹ *Id.* at 609.

²⁰ The Court's statement in *Fuentes* that "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred," *Id.* at 82, spawned views that *Fuentes* stood for a rule both Procrustean and contrary to the flexibility inherent in the concept of due process. *Mitchell v. W.T. Grant*, 416 U.S. 600, 628 (1974) (Powell, J., concurring).

²¹ 407 U.S. at 91. The Court included in the first exception prior cases in which the seizure was appropriate because the welfare of the public was endangered. *See, e.g., Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of mislabelled articles because of potential injury to consumers); *Fabey v. Mallonee*, 332 U.S. 245 (1947) (appointment of conservator of a bank where interests of creditors and public at stake); *Coffin Bros. v. Bennett*, 277 U.S. 29 (1920) (execution against stockholders of insolvent bank to protect public and depositors). Other important governmental interests have also been sufficient. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (seizure of a yacht pursuant to Puerto Rican law) discussed in

If we take the majority opinion at its word in *Mitchell*, it did not in that case overrule *Fuentes* but merely distinguished it. If this assertion strained our credulity in *Mitchell*, it must surely seem more plausible after *North Georgia Finishing, Inc.* for which *Fuentes* provided the controlling precedent. Given this assumption and the broad holding of *Fuentes*, it becomes necessary to accommodate *Mitchell* to the "extraordinary situations" exception of *Fuentes*.²² It will be helpful to take a closer look at those exceptions.

We must first inquire whether the criteria of the "extraordinary situations" exception are disjunctive or conjunctive. While the language quoted above seems to describe cumulative characteristics of a single situation,²³ the Court's elaboration and illustrations of these criteria make it clear as a matter of logic that the presence of any one of these three qualities characterizes a situation in which a seizure may occur before notice

note 23 *infra*; *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961)(discharge of a federal employee who had not met security requirements); *Phillips v. Commissioner*, 283 U.S. 589 (1931)(collection of taxes by summary procedure).

²² But see Comment, *Justice White's Chemistry: The Mitchellization of Fuentes*, 50 WASH. L. REV. 901, 905 (1975); Comment, *Constitutional Law*, 1975 U. ILL. L. F. 263, 265 (1975). The first comment suggests that Justice White carved out a new "extraordinary situation" in *Mitchell*. Similarly, Justice Stewart in his dissenting opinion in *Mitchell*, expressed the view that the general ability of the debtor-possessor to waste or dispose of the secured property cannot itself create an "extraordinary situation." 416 U.S. at 629-30, n. 1.

²³ But see Scott, *supra* note 5, at 826-27, n. 87; Comment, *Constitutional Law*, 1975 U. ILL. L.F. 263, 265. Also, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974), the Court appeared to be applying the three criteria cumulatively to sustain a Puerto Rican procedure for seizure of vessels used for unlawful purposes without notice and hearing. The second criterion, however, was used in a way very different from that illustrated in *Fuentes*. The opinion of Justice Brennan indicates that there was a need for promptness to serve the public interest satisfying the first criterion rather than a private interest. This interpretation, however, adds nothing to the first criterion which itself demands the seizure be necessary to support the public interest. Clearly a prehearing seizure in which there was no need for promptness would not be necessary. The Court's discussion of the third criterion focused only on the initial determination of seizure, not the availability of a later adversary hearing. The statute in issue, however, did provide postseizure notice and opportunity for hearing to at least some of the interested parties. *Id.* at 667-68. The Court's approach in *Calero-Toledo* was modeled on a footnote example in *Fuentes* itself, categorizing seizures under search warrants as "extraordinary situations." 407 U.S. at 93-94, n. 30. Justice White's concurring opinion in *Calero-Toledo* based simply on the presence of an important public interest, is more in keeping with subsequent developments as understood by this article. 416 U.S. at 691. See Comment, *Due Process and the Creditor's Right to Prejudgment Seizure*, 10 GONZAGA L. REV. 757, 762-65 (1975).

and hearing are required.

It is clear that a single situation cannot embody both the first and second criterion simultaneously. In expounding the meaning of the first criterion, the Court stressed that it was intended to permit seizures in which the public had an urgent interest. The Court cited as examples of these governmental or public interests "the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food."²⁴ A seizure in which "no more than private gain is directly at stake"²⁵ such as that in *Fuentes*, was clearly not within this first category. The contrast with the Court's description of the second criterion could not be more striking. In describing situations in which there is "a special need for prompt action," the Court's first and only example is a case "in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."²⁶ This is also a case where "no more than private gain" is at stake, however, and the first criterion clearly cannot apply. It should therefore be pellucid that an "extraordinary situation" justifying seizure before a hearing may exist even if only one criterion is satisfied. This should be sufficient to reject the contention that "extraordinary situations" under *Fuentes* must contain all three criteria.

An attempt to read *Mitchell* and *Fuentes* together reinforces this conclusion. As will be demonstrated below, the *Mitchell* situation cannot reasonably be characterized as satisfying either the first or second criterion. Therefore the result upholding the sequestration procedure can only be justified as exemplifying the third criterion, strict government control of a procedure narrowly defined and applied.

The dissenting opinion of Justice Stewart in *Mitchell* also demonstrates an understanding of the independence of the three criteria defining "extraordinary situations." The dissent, in a footnote, replied to the holding of the Louisiana Supreme Court, which distinguished *Fuentes* on the ground that sequestration was required to protect creditors from imminent danger of injury to the disputed goods, that is, that it satisfied the

²⁴ 407 U.S. at 92.

²⁵ *Id.*

²⁶ *Id.* at 93.

second criterion. The dissent argued that this characterization could not reasonably be made of every creditor-debtor situation to which the sequestration procedure applied.²⁷ It thus appeared to concede that if the statute were restricted to situations of imminent danger to the goods, the Louisiana court's holding would be persuasive. Significantly, Justice Stewart did not argue that, in any event, satisfaction of this criterion alone would not suffice to create an extraordinary situation since the other two criteria were manifestly absent, an obvious argument if the three criteria were conjunctive.

If the argument is so far valid, the decisions in *Mitchell* and *North Georgia Finishing, Inc.* make clear that the criterion which has emerged as the most important is the third—strict government control of a narrowly drawn seizure procedure.

III. EXCEPTIONAL PROCEDURE AS AN EXTRAORDINARY SITUATION

A. *The Rationale of Mitchell*

Only the application of the third criterion of an extraordinary situation can adequately account for the result in *Mitchell*. Certain features of the Louisiana procedure make it tempting to categorize it instead as falling under the second criterion. Indeed, this was the position of the Louisiana Supreme Court.²⁸ Furthermore, certain language of Justice White's opinion echoes the values protected by this criterion.²⁹ On close analysis, however, this conclusion must be rejected as justifying the *Mitchell* result.

Fuentes illustrates the second criterion, "a special need for very prompt action," with the example of cases in which a creditor can demonstrate that there is an imminent danger to the secured goods if they are left with the debtor.³⁰ The *Mitchell* opinion points to such risks to the creditor in discounting the propriety of the absolute requirement of a prior hearing.³¹ Moreover, the Louisiana sequestration statute called for the creditor to plead facts showing that "it is within the power of the [debtor] to conceal, dispose of, or waste the prop-

²⁷ 416 U.S. at 629, n. 1.

²⁸ *Id.* commenting on 269 So.2d 186 (1972).

²⁹ *Id.* at 609.

³⁰ 407 U.S. at 93.

³¹ 416 U.S. at 609.

erty"³² This provision of the statute, however, is not sufficient to show that the sequestration procedure upheld by the Court is restricted to situations in which there is a special need for prompt action. The requirement that it be "within the power" of the debtor to waste the secured property describes practically every case of consumer credit including those at issue in *Fuentes* and *North Georgia Finishing, Inc.* Justice Stewart's dissent in *Mitchell* is undoubtedly correct when it asserts that if this satisfied the *Fuentes* criterion, it would make every extension of credit in the sale of goods an extraordinary situation and would obliterate the *Fuentes* rule.³³

However, the majority in *Mitchell* plainly did not regard the case as falling within the second exception of a special need for prompt action. The need to provide protection to the creditor's interest is illustrated in that case, not only by the debtor's power to vandalize or conceal the property, but also by the fact that the debtor will make ordinary use of the goods thus depreciating their value at a time when the creditor is not compensated by continuing payments. This is not, nor could it be, classified as an extraordinary situation. Rather it shows that the common realities of consumer credit provide sufficient justification for prejudgment seizure if one of the other two criteria of an extraordinary situation is present. Since we are concerned only with seizures on behalf of private creditors, we are left with the third criterion—that of procedure.

B. *The Requisites of a Substitute Procedure*

It is useful to examine again the language of the third exception in *Fuentes*: "[T]he state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance."³⁴ It should be noted that unlike the first two criteria, this formula does not refer to the substantive reasons justifying a prehearing seizure. It deals solely with the manner in which the seizure is carried out. Since we have shown that the criteria present inde-

³² 416 U.S. at 623; LA. CODE CIV. PROC., art. 3571 (1961).

³³ 416 U.S. at 629, n. 1.

³⁴ 407 U.S. at 91.

pendent reasons for allowing *ex parte* seizures, it must follow that an appropriate procedure may satisfy due process even when utilized to foster a policy objective other than the swift response to urgent public or private needs covered by the first two criteria. Such an objective would be provided by the reconciliation of the conflicting interests of creditor and debtor discussed in Justice White's opinion in *Mitchell*. Under this analysis, an "extraordinary" situation is created by serving an "ordinary" interest through a procedure other than prior notice and hearing which is exceptionally protective of the interests of the party against whom the seizure is directed.³⁵

The third criterion seems to indicate that the exceptional procedure demanded must have two aspects. First, the decision as to whether a particular situation calls for summary seizures is to be made rationally by a neutral official whose discretion is narrowly confined by statute. Second, the departure from rudimentary due process must be the minimum necessary to accomplish the policy objectives at stake. Therefore, the opportunity for a hearing must be afforded the party suffering the deprivation as soon as is practicable following the seizure which protects the party in whose behalf it is executed.³⁶ These requirements manifest the *Fuentes* Court's concern with due process not as a theoretical command to be satisfied by a single response but as a means of minimizing the number and effect of occurrences of mistaken and arbitrary deprivations.³⁷ The limitation of prejudgment seizures to cases carefully specified by statute and verified by a discriminating neutral observer should reduce the instances of wrongful taking. The provision of a swift and effective alternate procedure may not be as effec-

³⁵ We recognize that the term "extraordinary" might be inappropriate in describing procedure which may be generally applied. We have chosen to continue the use of that term, however, because we believe that the values protected by the procedural alternatives discussed are identical to those implicit in the third "extraordinary" situation of the *Fuentes* opinion. See text accompanying note 34 *supra*. In a sense, use of the term "extraordinary" may be unfortunate, for the implementation of those procedures should win them familiarity.

³⁶ Thus in the context of school suspensions the Court has held that due process may be satisfied in certain narrow situations by provision of a hearing within a short time after the suspension. *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975). As to the mode of procedure which should be required when one of the first two criteria excuses the need for prior notice and hearing see note 53 *infra*.

³⁷ 407 U.S. at 81.

tive in achieving the stated goal of due process as requiring prior notice and hearing in every case, but it may, when combined with an independently desirable goal, create the "extraordinary" situation in which an exception to the presumptive rule is appropriate.

The cases which followed *Fuentes* confirm this analysis. It has already been noted that *Mitchell* involved neither a special public interest nor an urgent private need for prompt action to protect property from concealment or injury. *Mitchell* does stress, however, the legitimacy of the state's decision to protect the creditor's interest in certain situations and the special measures provided to protect the debtor from whose possession the property is seized.³⁸

Both aspects of the third criterion of *Fuentes*' extraordinary situations were found present in *Mitchell*.³⁹ Moreover, it is the presence of these same aspects indicating the satisfaction of the third criterion which provides the basis on which the *Mitchell* majority distinguished *Fuentes*. As to the first aspect, the Louisiana procedure, which provided for a judicial examination of specific facts justifying the seizure, presumably assures an intelligent discriminating decision that the conflicting claims of ownership are such that the narrow statutory policy of allowing temporary possession by the creditor applies.⁴⁰ The Court took pains to show by citation to Louisiana law that the issuance of the writ was more than a "ministerial act" and that the debtor was not at "the unsupervised mercy of the creditor and court functionaries."⁴¹ While there is a dispute between the dissent and the majority as to the actual character of the issuance of the writ in Louisiana,⁴² the important point is that the Court's opinion was based on what it believed to be provision for a meaningful examination of the application for seizure by a neutral and discriminating magistrate which would reduce the instances of mistaken seizure.

³⁸ 416 U.S. at 625 (Powell, J., concurring).

³⁹ See note 36, *supra* and accompanying text.

⁴⁰ 416 U.S. at 616. Recently the Louisiana Supreme Court has held the procedural protections required by *Mitchell* do not demand that the seizure be authorized by a judge rather than a court clerk. The court emphasized that the Supreme Court cases dwell only on the function and not on the title of the relevant offices. *Hood Motor Co. Inc. v. Lawrence*, 329 So.2d 111 (La. 1975).

⁴¹ 416 U.S. at 616.

⁴² *Id.* at 632-3.

The second aspect of the procedural exception of *Fuentes* was also held to have been satisfied by the *Mitchell* majority. The departure from the standard due process protections of prior notice and hearing were seen as sufficiently slight to minimize the injury which might arise from a mistaken deprivation.⁴³ The Louisiana statute provided that after the seizure, an *immediate* hearing was available to the debtor at which the writ would be dissolved and the property returned unless the creditor carried the burden of proving his right to the property.⁴⁴ Thus the duration of the deprivation was kept to a strict minimum which would be extended only so long as the debtor delayed seeking a hearing. In addition, on such dissolution the debtor was entitled to damages for the taking and for attorney's fees, both amounts secured by the posting of a bond required by the creditor as a precondition for issuance of the writ.⁴⁵

When *Fuentes* was called upon in *North Georgia Finishing, Inc.* to strike down the Georgia garnishment statute, the Court was again faced with a case in which neither of the first two criteria of *Fuentes*' "extraordinary situations" were present.⁴⁶ Thus, issue was joined on the presence or absence of the procedural protections afforded to satisfy the third criterion. The Court concluded that the prejudgment seizure of wages in that case did not comport with due process because there had been no "notice and . . . opportunity for a hearing or other safeguard against mistaken repossession. . . ."⁴⁷ The circumstances in which the Georgia writ was issued were far less protective of the debtor's interest and did not attempt to minimize

⁴³ *Id.* at 618.

⁴⁴ *Id.*; See also LA. CODE CIV. PROC., art. 3506 (1961).

⁴⁵ 416 U.S. at 606.

⁴⁶ The seizure was not directly necessary to secure an important governmental or general interest nor was there a special need for prompt action. *North Georgia Finishing, Inc.* presented the Court with an opportunity to restrict the procedural protections to deprivations of wages or other vital property. This was the approach of the Georgia Supreme Court in its opinion upholding the challenged statute. 201 S.E. 2d 321, 323 (Ga. 1973). But that court failed to even cite *Fuentes*. Had the Supreme Court approved this reasoning, *Fuentes* would have become an aberration. In fact, *North Georgia Finishing, Inc.* made clear that it would follow *Fuentes*' broad sweep in this regard: "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." 419 U.S. 608. Compare the opinion of Justice Blackmun joined by Justice Rehnquist. 419 U.S. at 614 (Blackmun, J., dissenting).

⁴⁷ 419 U.S. at 606 (emphasis added).

mistaken deprivations. Instead of a judge acting on specific allegations, the garnishment writ could be issued by a court clerk on conclusory allegations of a debt and a pending action thereon.⁴⁸ Also, unlike *Mitchell*, there was no means by which a defendant whose funds were seized could swiftly challenge the grounds for the seizure, recover his property, and be compensated for the injury he suffered because of the deprivation.⁴⁹ Indeed, it appeared that only the filing of a counter-bond (itself a type of deprivation) was available to the defendant as a means of recovering his property *pendente lite*.⁵⁰ The vice in the Georgia statute was not merely its failure to provide prior notice and hearing. It also lacked "saving characteristics,"⁵¹ protective procedures which minimize both the risk and injury of takings by the state which turn out to be improper.⁵²

C. *The Insufficiency of Exceptional Procedure*

It may be necessary to dispel a mistaken inference which could be drawn from the argument made above. Since it has been shown that any of the three criteria described in *Fuentes* is sufficient to create an extraordinary situation and an exemption from the requirement of prior notice and hearing, it appears that the third criterion developed in *Mitchell* and *North Georgia Finishing, Inc.* provides a justification for summary seizure from procedure alone. This notion would allow *ex parte* seizures for the most frivolous, arbitrary, or invidious reasons so long as the decision was made in the right way by the proper official, and an opportunity for quick reversal with a minimum of lasting harm was provided thus satisfying both criteria.

This is not the rule which we see emerging from the cases. These cases are concerned solely with the timing of state takings with respect to notice and hearing, not with the substantive policy reasons which might prompt the state to engage in such takings. This does not mean that such objectives are be-

⁴⁸ *Id.* at 607.

⁴⁹ Therefore both aspects of the procedural exception of *Fuentes*, *supra* note 40 and accompanying text, were absent. *Id.*

⁵⁰ *Id.* This protection was deemed inadequate in *Fuentes*, as well. 407 U.S. at 84-85, n. 14.

⁵¹ *Id.*

⁵² See Hansford, *supra* note 5 at 603, 605.

yond constitutional control. The equal protection clause and whatever substantive elements remain of the due process clause of the fourteenth amendment preclude takings which are arbitrary or entirely unrelated to permissible objects of state regulation. This is, however, a separate question from what factors allow a state to dispense with the ordinary procedural due process requirement that takings be preceded by notice and the opportunity for hearing.⁵³

It is clear that the substantive policy reasons for the taking do influence the answer to this principal question when those reasons fall within the first two criteria of *Fuentes*' extraordinary situations. In those cases the reasons for the seizure necessarily imply a need for haste which justifies dispensing with the notice and hearing. When the third criterion is utilized, however, the substantive reasons are not relevant to this inquiry. So long as the purpose is permissible, it may be furthered by prejudgment seizure if that seizure is hedged with the necessary protective procedures. We then have an extraordinary situation created not because of the pressing nature of the interest at stake but because the procedures invoked are a close substitute for the traditional procedural safeguards.⁵⁴

⁵³ Just as procedure alone does not justify a taking without a substantive reason, we assume the employment of the first or second criteria for summary seizures does not provide an excuse for total abandonment of procedural rights of the person deprived. Due process will still require that that person be given an opportunity to show that the taking was wrongful. Moreover, that opportunity should be provided as soon as is practical under the circumstances. See *Goss v. Lopez*, 419 U.S. 565, 583 (1975). In short, the same postseizure procedures which partially justify seizures under the third criteria would be required in every case of seizure without hearing. However, there would still be a significant distinction between the different criteria with respect to the steps which must be taken before the seizure to justify dispensing with notice and a hearing. Such steps would be decreasingly formal as the urgency of the need for the seizure increased.

⁵⁴ Thus there are two kinds of procedures which satisfy due process. One is the "ordinary" system in which the taking is preceded by notice and opportunity to reply. The second is the "extraordinary" system in which the alternate procedures provide an adequate substitute. The recent case of *Mathews v. Eldridge*, 96 Sup. Ct. 893 (1976) is not contrary to our argument. In that case the discontinuance of social security disability payments was held permissible in a procedure which permitted delay of any face to face hearing for as much as a year after termination. *Id.* at 906. This would clearly be inadequate to create the extraordinary procedure alternative. But we see *Eldridge* as illustrating one version of the ordinary situation. Unlike the challenged takings in *Fuentes*, *Mitchell*, or *North Georgia Finishing, Inc.*, the recipient in *Eldridge* was given fairly complete advance notice of the proposed termination and supporting reasons and was given time before termination to respond in writing. The

Thus the interest of the state in accommodating the different interests of a secured creditor and a debtor in possession on the occasion of a disputed default has been endorsed by the Supreme Court in *Mitchell* as one which the state may properly pursue by the device of summary seizure pending a final judicial determination.⁵⁵ This interest however is ordinary. It is the special protection to the debtor provided by the sequestration statute creating the extraordinary situation which allows dispensing with the prior hearing. The Court in *North Georgia Finishing, Inc.* had no occasion to evaluate the substantive reason for prejudgment seizure, since in any event the procedural safeguards necessary to convert its use into an extraordinary situation were missing. The interest in that case was to preserve for a civil plaintiff the resources necessary to satisfy a potential judgment. It is apparent that with the proper procedure this interest would be sufficient to create an extraordinary situation. This would follow from the *Mitchell* Court's citation of earlier cases upholding the creation of prejudgment attachment liens, in particular *McKay v. McInnes*, the 1929 *per curiam* opinion sustaining the Maine general attachment statute.⁵⁶ Such a procedure was deemed a legitimate part of a state's apparatus for the vindication of claims.⁵⁷

D. *The Content of the Post-Seizure Hearing: Carey v. Sugar*

When we recognize that *ex parte* seizures might be justified by a number of legitimate state interests, a further ambiguity arises. To what extent must the substitute procedural

form of prior notice and opportunity to respond is a matter which may legitimately vary with the kind of interests at stake. *Fuentes v. Shevin*, 407 U.S. at 96-97 (1972). See, Note, *Specifying the Procedures Required by Due Process: Toward Limits On the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1511 (1975). The Court in *Eldridge* believed a written prior hearing was appropriate in that case.

⁵⁵ 416 U.S. at 607.

⁵⁶ 279 U.S. 820 (1929), cited at 416 U.S. 613-14. The *McKay* case has had a checkered history in the modern decisions. It was cited by Justice Douglas in *Snidach* to illustrate that some summary procedures may be satisfactory for "attachments in general" 395 U.S. at 340. In *Fuentes* Justice Stewart practically overruled *McKay* by limiting its effect to the cases on which it relied, both of which could be accommodated by the "extraordinary situations" exception. In *Mitchell*, Justice White restored *McKay*'s vitality by relying on it to show that commercial interests could justify a departure from a strict rule of prior notice and hearing. 416 U.S. at 613. The case was not cited in *North Georgia Finishing, Inc.*

protections vary according to the interest which is being served?

Given the proper saving procedures, a prejudgment seizure might be allowed either to accomodate the interests of lien creditors and consumer-debtors during a dispute, or to secure a plaintiff's potential judgment. In either case a key feature in the necessary substitute procedure would be a prompt opportunity for a judicial determination of whether the taking was wrong. It is not clear, however, what facts would be relevant to such a determination in each case. Nor is it obvious that the subjects of these hearings would be the same given the different reasons for the seizure.

This very issue was raised in a case heard last term in the Supreme Court. In *Carey v. Sugar*,⁵⁸ the validity of the New York attachment statute was challenged in an action brought by a state court defendant. Under the New York statute, the state court plaintiff had attached, without notice or hearing, funds in the hands of a third party owed to the defendant. The New York procedure allowed a judge to issue such an order on the *ex parte* application of a creditor who claimed there existed certain specified grounds for believing any future judgment might be imperiled by acts of the defendant.⁵⁹ Furthermore, the statute provided that the writ could be vacated prior to judgment on motion of the defendant.⁶⁰ The three judge court, although finding many similarities between this procedure and the Louisiana sequestration statute upheld in *Mitchell*, determined that the postseizure hearing in New York was fatally distinguishable from that in *Mitchell*. Specifically, the district court determined that the hearing made available under New York law focused solely on the necessity of continuing the dep-

⁵⁷ Some commentators have suggested that a more rigorous procedural requirement might be imposed in the case of general attachment where the seizing plaintiff does not have a pre-existing property interest in the thing taken. See Hansford, *supra* note 5 at 606; Comment, *Justice White's Chemistry: The Mitchellization of Fuentes*, 50 WASH. L. REV. 901, 908-10 (1975). In *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643 (S.D.N.Y. 1974), discussed at text accompanying notes 58-64 *infra*, the district court drew the same distinction in deciding that the New York attachment procedure should be measured against the standards of *Fuentes* and not *Mitchell*.

⁵⁸ 425 U.S. 73 (1976) vacating and remanding *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643 (S.D.N.Y. 1974).

⁵⁹ 383 F. Supp. 643, 644 (S.D.N.Y. 1974).

⁶⁰ *Id.* at 648.

rivation to maintain the security of the plaintiff, whereas the hearing found satisfactory in *Mitchell* focused on whether grounds existed for issuing the writ. Thus the hearing approved by the Court in *Mitchell* examined the substantive merits of the claim of the plaintiff creditor.⁶¹

The Supreme Court, however, in a *per curiam* opinion, found that the district court had been too hasty in placing this construction on the New York statute. State court cases prior to and after the lower court decision indicated that the law might, in fact, demand a prompt hearing on the merits as in *Mitchell*. If this were the case, the Court was of the opinion that constitutional doubts as to the validity of the statute would be removed. The case was therefore remanded to the three judge court with directions to abstain from any decision until the parties could get a state court construction of the law.⁶² The abstention was mandated under the principles of *Railroad Commission v. Pullman Co.*⁶³

It seems clear, therefore, that a quick postseizure hearing on the merits of the controversy would be satisfactory whether the grounds for the seizure were protection of the creditors' preexisting property interest as in *Mitchell* or the securing of assets to satisfy a potential judgment as in *Sugar*. This does not, however, preclude the sufficiency of a hearing to determine the need for security when only the latter interest is involved. Indeed, Justice Powell, in his concurring opinion in *Mitchell* saw the hearing there as an opportunity to determine the merits. In *North Georgia Finishing, Inc.*, in discussing what would be required of a valid preattachment procedure available to plaintiffs generally, however, he contemplated only a hearing

⁶¹ The Court viewed this hearing as an opportunity to put the plaintiff to proof of the existence of the interest, lien and delinquency. 416 U.S. at 606. This, at least, was the Court's perception which for our purposes is the important point. See text accompanying notes 41-43 *supra*.

⁶² *Carey v. Sugar*, 425 U.S. 73 (1976). The Supreme Court merely noted in a footnote two other grounds upon which the district court had distinguished the New York procedure from that upheld in *Mitchell*. First, under New York law the attaching plaintiff has no property interest in the goods and second, the burden of proof is on the defendant at the subsequent hearing to dissolve the attachment. The former ground in particular has been deemed crucial by some observers. See note 57 *supra*. The Supreme Court, however, apparently viewed the purpose of the postseizure hearings as the critical variable.

⁶³ 312 U.S. 496 (1941).

at which the plaintiff should show "probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt."⁶⁴ Whether this different kind of inquiry would be sufficient given the different purpose of the seizure was the question which the Supreme Court in *Sugar* was able to avoid. A construction of the statute in keeping with that determined by the district court would require consideration of that court's legal conclusion that a hearing on the merits was necessary in both cases.

Given this construction and the purposes of allowing an alternative procedure to substitute for prior notice and hearing, we believe, the three judge court's determination of the constitutional question was correct. At least in these two instances, the postseizure hearings should investigate the same thing: the underlying substantive claim on which the creditor bases his right to immediate possession or the plaintiff his right to judgment. The purpose of the immediate postseizure hearing is to minimize the impact on the defendant or debtor of deprivations which turn out to be mistaken.⁶⁵ This hearing, together with the careful preseizure examination which is intended to cut down on the number of mistaken deprivations, serves the purpose of the traditional due process protections prescribed in *Fuentes*: "to minimize substantively unfair or mistaken deprivations of property"⁶⁶

The mistaken deprivation in the context of the secured creditor is plainly one in which there has been no default entitling the creditor to possession. Thus the focus of the postseizure hearing should be the likelihood of the creditor's ultimate success in his claim on the merits. Only the establishment of this ultimate issue can determine whether the creditor was entitled to the protection from damage or wear provided by the seizure. If the creditor's claim is to fail, the debtor's possession should have continued uninterrupted and the seizure will have been a mistake. Exactly the same analysis is applicable to general attachment. Again we must focus on the ultimate outcome of the litigation to determine if it was proper to freeze the

⁶⁴ Compare 416 U.S. at 625 with 419 U.S. at 611-12.

⁶⁵ 416 U.S. 618.

⁶⁶ 407 U.S. 81.

defendant's assets in anticipation of a judgment against him. If it turns out that there is no judgment, the defendant will have been deprived for nothing and the taking will have been a mistake. Moreover, this will be a mistake no matter how poor a risk the debtor-defendant was shown to be. There is, therefore, no reason for differentiating in this matter between the lien creditors in *Mitchell* and the plaintiffs in *Sugar*. In each case the justification for the taking is a protection against a later contingency, and in each case the due process inquiry should be focused on the probability of that contingency occurring. An inquiry limited to the question of the debtor-defendant's ability or inclination to maintain resources to satisfy a judgment, as the district court found in the New York procedure in *Sugar*, would make no distinction between serious, well-founded claims which were likely to result in a judgment and frivolous claims which would not bear up under even casual scrutiny. The seizure decision, as the district court in *Sugar* interpreted the statute, would turn not upon whether the deprivation was likely to be necessary to serve a useful purpose but upon the character or economic status of the defendant. Such an inquiry would be irrelevant to the practical objectives of due process protection.⁶⁷

IV. EVALUATING THE EMERGING RULE

The interpretation of the prejudgment seizure cases we have put forward is neither illogical, impractical, nor unfair when considered in light of the different interests affected or the values to be protected by procedural due process. The basic problem in prescribing the procedural requirements of a constitutional deprivation consists in accommodating two antagonistic interests. The state, or the party on whose behalf the state acts, has a legitimate interest in preserving intact the value of

⁶⁷ The question arises, however, whether the need for security should not have to be proven *in addition* to the probable validity of the underlying claim. We think not. An adequate procedure should be sufficient to justify prehearing seizure for any legitimate purpose. Having determined that there is a substantive claim by the plaintiff, the security made possible by attachment is enough without a special showing of insecurity. The converse would not be true, however. No seizure before notice and hearing would be allowed on a showing of insecurity *without* the additional showing of a substantive claim. Such takings would be entirely arbitrary since they would be unrelated to any serious claim of the attaching party.

the thing taken. Increased costs are imposed on the taking party as procedural requirements enlarge the opportunity for the party in possession through ordinary use or willful act to diminish the value of the property. On the other hand, the party in possession has a legitimate interest in maintaining possession if the circumstances which might justify its termination are not actually present. Therefore, to the extent that summary procedures create an increased risk of such wrongful takings, costs are imposed on the party in possession. These two kinds of costs cannot be reduced simultaneously. Reducing one set of costs by definition increases the others. It is impossible to reconcile these interests; rather we must strike a balance between them.

It might be possible to choose a procedural standard for each class of potential seizures which minimizes the total costs to both parties. Thus a rough pecuniary measurement might inform us that given the incidence of mistaken seizures, the kinds of goods involved, the observed behavior of consumer-debtors and the efficiency of judicial machinery, the total savings to consumers from a mandatory hearing before seizure of consumer goods by secured creditors are less than the total additional costs such a hearing would impose on the creditors. On this finding we could conclude that the hearing requirement is economically inefficient and refuse to require it. Such an approach, however, would ignore the due process clause of the fourteenth amendment.

It is evident that the due process clause is an endorsement of the interest of the party in possession. The clause is an injunction against disturbing the existing balance of property interests unless valid legal reasons are shown in an appropriate procedure. As Justice Stewart observed in *Fuentes*, the point is to minimize mistaken deprivations by the state. The interest of the party demanding state assistance in altering the balance of interests under a claim of legal right is not accorded similar solicitude by the Constitution. Therefore, in balancing the relative costs of a given procedure, the fourteenth amendment directs that a presumptively greater weight be accorded the costs of the party who might mistakenly be deprived of possession.⁶⁸

⁶⁸ See *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 91 (1972). *Boddie v. Connecticut*, 401 U.S. 371 (1971) appears to present an exception to the notion that

In fact it is possible to read the fourteenth amendment as a rejection of any attempt to balance the two interests. Under this interpretation, every state deprivation would be prohibited where the legitimacy of the deprivation had not been established by the traditional fact-finding process of the law, the efficacy of which is assumed. The due process clause under this reading would be an injunction to reduce the costs to the party in possession as near to zero as possible by similarly reducing the risks of mistaken takings.⁶⁹ The majority opinion in *Fuentes* strongly intimates that this absolute rule represents the proper interpretation of the Constitution: "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. . . . [T]he Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect."⁷⁰

But *Fuentes* itself is evidence that the Court is not willing to accept what Justice Powell labeled "a Procrustean rule of a prior adversary hearing."⁷¹ The recognition of the extraordinary situation is a declaration that the values protected by the due process clause may be outweighed by other legitimate public interests. The first two categories of extraordinary situations are obvious examples. In these situations the exceptional costs to the public welfare or state assisted private parties will be greater than the costs of mistaken deprivations to parties in

due process protections guard only against those seeking to alter the status quo. In that case, however, it is informative to note that Justice Harlan's opinion analogized indigent divorce plaintiffs to civil defendants in that both were attempting to resist or free themselves of state imposed burdens in a situation where the state maintained a monopoly on the means of relief. 401 U.S. at 374-78. Clearly the creditor-plaintiff seeking state assistance can take little comfort from this precedent.

⁶⁹ We assume that the due process requirement of notice and an opportunity for a hearing prior to taking incorporates a constitutional judgment that such procedures are effective in eliminating mistaken deprivations. In fact, we might go further and say that for purposes of constitutional analysis, a taking occurring after adequate notice and opportunity for hearing is by definition not a mistaken deprivation. There may be some difficulty determining which fact-finding questions are relevant in creating or preventing mistaken deprivations, but having done so, we assume the specified procedure is completely effective. Thus the costs to debtor-defendants from variations in procedure are costs of continuing mistakes until they are eliminated in a delayed hearing. Professor Scott has provided a thorough and enlightening consideration of the relevant costs and benefits when this assumption is relaxed. See Scott, *supra* note 5.

⁷⁰ 407 U.S. at 82.

⁷¹ 416 U.S. at 628 (Powell, J., Concurring).

possession.⁷² A similar balance may be achieved not by increasing the costs of delay to the party interested in seizure but by reducing the costs of summary action to the party in possession. This is the meaning of the diverse decisions in the cases under discussion. The reduction of the risk of wrongful takings and the minimizing of the impact of wrongful takings which the majority saw present in the Louisiana sequestration procedure upheld in *Mitchell* so diminished the costs to debtors in possession as to make them less weighty than the legitimate interests of the state in protecting the value of the creditors' collateral. This balance was struck notwithstanding the special constitutional interest in preventing mistaken takings.

This recognition of a limited area in which the balancing of the competing interests is permissible is in keeping with the flexible approach to due process which has been traditional in the Court's decisions under the fourteenth amendment.⁷³ It assures that the critical objective of the due process clause, the prevention of arbitrary and mistaken takings, will receive a minimum level of protection, either by prior notice and hearing or by a substitute procedure which will also safeguard that interest. The Court will scrutinize carefully the adequacy of such substitute procedures, upholding statutes like the one in *Mitchell*, rejecting statutes like the one in *North Georgia Finishing, Inc.* This approach, however, also allows the state to give special protection to important public and private interests which might bear exceptional costs if an unyielding rule of prior hearing were imposed.

V. CONCLUSION

We recognize there are those who will regard the foregoing discussion as naive. The decisions in *Fuentes*, *Mitchell*, and *North Georgia Finishing, Inc.*, some critics will say, may be

⁷² See *The Supreme Court 1971 Term* 86 HARV. L. REV. 50, 91 (1972).

⁷³ These cases are reviewed in Justice White's opinion in *Mitchell*, 416 U.S. at 611-14. *Goldberg v. Kelly*, 397 U.S. 254 (1969) also appears to promulgate an absolute rule of prior notice and opportunity for hearing. *Id.* at 263-64. However, *Goldberg* might be reconciled with the model proposed here in that the statute invalidated in *Goldberg* allowed the lapse of a possible 22 "working days" between the time a post-termination fair hearing was requested and the time a decision was rendered, and this potential 22 day time lapse would not qualify as a sufficiently prompt determination. The Court noted that even this time limit was rarely observed. 397 U.S. at 259-60, n. 5.

explained not by an overarching legal principle or policy but by the appointments of Justices Powell and Rehnquist and the indecision of Justice White. They would insist that to construct emerging principles by reconciling the opinions of judges who were in basic disagreement is to engage in a pointless exercise in scholasticism. However, even assuming the premises of this argument to be true, we disagree.⁷⁴

All court-made law is the product of the learning and opinions of individual judges at different times. The motives and moods of these judges cover the widest possible range and undoubtedly influence the decisions they render. Notwithstanding this, the common law has yielded what must be accorded the title of rules. The rule that a promise given in return for consideration is enforceable is elementary black letter law. But it is the product of centuries of decisions based on diverse and sometimes conflicting factors.⁷⁵ May we then say that the rules of consideration are only an academic fiction? The creation of more or less consistent rules out of more or less divergent decisions presents a paradox explained by the broad constraints in which judges operate.⁷⁶ The effectiveness of *stare decisis* may be debated, but it is incontestable that judges as a group rationalize their results on decisions of the past. The way in which they perform this rationalizing function will be influenced by their personal temperaments, their views of policy, and even by the identity of the parties before them. However, the momentum towards a rule which reconciles the demands of the present with the decisions of the past is always present.

It seems to us that while this familiar explanation has been readily accepted in the field of common law, it has been more

⁷⁴ Other authors have attempted to reconcile the recent prejudgment seizure cases. See, e.g., Rendleman, *supra* note 6 at 35. Rendleman proposes a three step due process analysis: 1) Does the debtor possess a constitutionally cognizable interest in the disputed property? 2) Are the interests sole or dual? 3) Considering the nature of the interests, what process is due? *Id.* at 41.

⁷⁵ See T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 649-56 (5th ed. 1956). Alas, even this is not free from doubt. Professor Gilmore has given a compelling explanation of the doctrine of consideration and other aspects of contract law not as the product of judicial evolution but as an academic creation of late nineteenth century scholars and jurists. GILMORE, THE DEATH OF CONTRACT 18-34 (1974). The more traditional view, however, is not without its persuasive defenders. Gordley, *Book Review*, 89 HARV. L. REV. 452 (1975).

⁷⁶ See generally B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1964).

skeptically received when applied to the law of the Constitution. Perhaps the striking statures and personalities of Supreme Court Justices and the great public interest in the issues with which they deal have made us more sensitive to the individual motives in particular cases than to the long-term results of the process of adjudication.⁷⁷ We believe the nature and purpose of constitutional law should stimulate great concern for the discovery of principles in the work product of the United States Supreme Court even when the superficial result appears chaotic. To give up this search because an individual decision or vote may be based on politics or unreason, is to resign ourselves to a constitutional law which is essentially undiscoverable. Such resignation is antithetical to the very idea of a government limited by law.

It is the shared task of lawyers, judges and academicians to make sense out of the often irritating and diverse profusion of case law which is the constitutional law of the United States. We cannot expect to arrive at a perfectly consistent and unchanging set of answers to questions which arise under the Constitution. But we can hope to keep the task within manageable limits by formulating working rules through a process which accommodates constitutional text, decided cases and social policy. It has been to this end that we have offered our suggestions on the proper meaning to be attributed to the constitutional cases discussed.

⁷⁷ See generally Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 CHI. L. REV. 661 (1960).

